No. 93-1543

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CHRISTINE MCKENNON,
Petitioner,

v.

NASHVILLE BANNER PUBLISHING CO.,
Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes: *Pages:*

Miscellaneous: *Pages:*

I. INTRODUCTION

Respondent urges this Court to adopt a per se rule[1] that would "bar all relief" (R.Br. 22-42) and require dismissal of all ADEA claims whenever its proposed after-acquired information doctrine applies. As now enunciated by respondent, that per se rule would mandate dismissal of any employment discrimination complaint if a court concludes that three distinct requirements have been met:

(a) the plaintiff engaged in "*serious* wrongdoing related to employment";

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[1] As we noted in our opening brief (P.Br. 2-4), the complaint in this action expressly sought several distinct types of relief. The proceedings in the district court were controlled by Sixth Circuit precedent, which required -- where the after-acquired information doctrine applied -- that a complaint be dismissed completely and that all relief be denied. (Pet. App. 13a-17a) (District Court decision citing Sixth Circuit precedent). The Sixth Circuit decision in *Johnson v. Honeywell Information Systems, Inc.*, 955 F.2d 409 (6th Cir. 1992), was issued on January 30, 1992, six weeks before petitioner's district court brief, and four months before the district court decision. (J. App. 2a, 3a). By the time this case came before the court of appeals, there were four Sixth Circuit cases imposing this per se rule. (Pet. App. 5a, 6a, 6a n.6). Respondent now insists that petitioner was obligated to set out in her briefs in the lower courts how each remedy sought in her complaint would be affected if those courts utilized, instead of that per se rule, the remedy-specific approach in *Wallace v. Dunn Construction Co.*, 968 F.2d 1174 (11th Cir. 1992), *rehearing en banc granted*, ___ F.3rd ___ (11th Cir. 1994). (R. Br. 3, 3 n.7, 11). But such arguments would have been pointless, since the Sixth Circuit had already rejected the *Wallace* approach. Operating within the constraints of Sixth Circuit precedent, petitioner defended, and respondent attacked, the complaint in its entirety. Neither party can fairly be said, on that account, to have waived its right to advance arguments regarding the particular remedies sought in the complaint if this Court, as we urge, adopts a remedy-specific rather than a per se rule. Respondent itself advances in this Court just such arguments (R.Br. 42 n.59), although it did not do so in the courts below.

(b) discharge for that misconduct would be "objectively reasonable";

(c) the employer would in fact have terminated the plaintiff for the misconduct had that employer been cognizant of it.

(R.Br.17-18)[2].

Respondent offers no standard for distinguishing "serious" misconduct, which would be fatal to any ADEA claim (if the other requirements are met), from non-serious misconduct which, presumably, would have no impact whatever on such a claim. In reply to our objection to the lack of any specific standard, respondent retorts that the distinction is so obvious that a request for a standard "defies reason and experience and is insulting to the federal judiciary." (R.Br.17 n.26). Respondent also proffers no explanation of how to determine when a dismissal would be "objectively reasonable", other than to suggest that this is not a question that should be left to a jury. (R.Br.19 n.30). These amorphous formulations provide no meaningful guidance for assessing employee actions in the infinite variety of employment disputes that arise at plants and offices with widely divergent standards, practices, and corporate cultures[3].

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[2] Respondent appears to suggest yet a fourth requirement, that there be no "direct evidence" of discrimination. (R.Br.13-14 n. 22; see also *id*. at 49).

[3] Few employers would dismiss a worker who made a single personal telephone call from a company phone; most employers would probably fire a worker who covertly made $10,000 in personal long distance calls at the firm's expense. But courts have no authority or capacity to establish a federal common law rule as to how many personal telephone calls on an office phone constitute "serious" wrongdoing.

In our view the threshold question is a narrower and simpler one -- would the employer in fact have dismissed the plaintiff had it known of the asserted misconduct? The seriousness of the asserted misconduct, and the reasonableness of the dismissal are, we suggest, merely evidence the finder of fact may consider in determining what the employer would have done had it learned of the misconduct.[4] Satisfaction of this single requirement,[5] however, entitles an employer, not to dismissal of all claims, but only to certain limitations on the available relief.[6] The analysis which we advance is similar to that of the Third Circuit in *Mardell v. Harleysville Life Insurance Co.*, 1994 WL 396512 (3d Cir. 1994).

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[4] The ADEA does not establish its own code of employee conduct or level of sanctions. Federal anti-discrimination law permits an employer to dismiss workers for trivial offenses, and to take actions a judge or jury may regard as unreasonable, so long as the employer's actions are not animated by a discriminatory motive and, in some instances, so long as they do not have a discriminatory effect.

[5] In enforcing the NLRA, the NLRB imposes a second requirement, that the employer prove the employee engaged in "misconduct so flagrant as to render the employee unfit for further service or a threat to the efficiency of the plant." See *John Cuneo Inc*, 298 NLRB 856, 857 (1990); *Owens Illinois Inc.*, 290 NLRB 1193, *enf. without opinion*, 872 F.2d 413 (3d Cir. 1989); *Mandarin*, 228 NLRB 930, 931-32 (1977); *O'Daniel Oldsmobile*, 179 NLRB 398, 405 (1969). However, because the federal courts which enforce the ADEA and Title VII, unlike the NLRB, lack the experience and expertise in employment matters necessary to evaluate readily such fitness issues, and because the EEOC Guidelines contain no such restriction, we do not advocate imposing this additional requirement on employers in discrimination cases.

[6] As we note in our opening brief (P.Br. 30-42), an employer which can prove that absent discrimination it would have discovered the misconduct prior to the date of entry of judgment may be able to limit relief, specifically pre-judgment backpay, even further.

After-the-fact discovery of misconduct on the part of an ADEA plaintiff cannot legalize nunc pro tunc unlawful action by an employer. See *Kiefer-Stewart Co. v. Seagram & Sons, Inc*, 340 U.S. 211, 214 (1951). Unlike purely private contract disputes between employers and employees, civil actions under the ADEA enforce statutory norms of transcendent public importance. Nothing in the language of the ADEA authorizes dismissal of otherwise meritorious discrimination claims as a method of recompensing employers for injuries sustained by reason of employee misconduct; the appropriate remedy for an employer aggrieved by such injuries is an action under applicable state law.

II. AFTER ACQUIRED INFORMATION SHOULD BE TREATED IN THE SAME MANNER UNDER THE ADEA AS UNDER OTHER FEDERAL LAWS REGULATING EMPLOYER-EMPLOYEE RELATIONS

The established interpretations of five other federal laws regarding employer-employee relations have rejected a per se rule denying all relief. (P.Br.13-21). Respondent does not challenge the correctness of these interpretations of those statutes,[7] but insists that the ADEA should be construed differently.

Respondent suggests that reference to the unquestioned interpretation of other statutes is never

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[7] *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962) does not support respondent's suggestion that the Fifth Circuit awarded back pay because the employer had "waived" its right to dismiss the plaintiff. On the contrary, the Fifth Circuit insisted that some remedy was *always* required for a proven violation of the FLSA. 302 F.2d at 156 ("it is impossible for us to imagine cases when a denial of both reinstatement and reimbursement would be justified (once a court has concluded that an employee was discharged in violation of the Act)"). See also *id* at 155 (employer "was not informed of several of Mrs. Powell's actions until after her discharge.")

appropriate, because the ADEA is simply a distinct statute with its own purpose and legislative history. (R.Br. 43). Respondent objects particularly to reliance on the settled interpretation of the NLRA and the FLSA. (R.Br. 43 n.60). But this Court has expressly relied on the NLRB's interpretation of the NLRA, and on judicial interpretation of the FLSA, in construing Title VII. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 768-770 (1976)(NLRA); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (FLSA), 419-20 (NLRA)(1975). There is no reason to ignore this same body of law when construing the ADEA.

Respondent urges that the established interpretation of statutes such as the Federal Employers' Liability Act is irrelevant because those laws provide redress for physical injuries which are "palpable and tangible". (R.Br. 44-45). But the injuries subject to redress under federal anti-discrimination law are equally real and substantial. Plaintiffs who are dismissed in violation of the ADEA or Title VII suffer "tangible, economic" harm, see *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986); the economic loss of an employee dismissed in violation of the ADEA is indistinguishable from the economic loss of an FELA plaintiff unable to work because of a physical injury. Discriminatory on-the-job harassment also causes "tangible effects"; it may "affect employees' psychological well being ... and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Systems, Inc.*, 126 L.Ed.2d 295, 302 (1993). Injuries caused by invidious discrimination are certainly as important as the injuries redressed by the FELA. Federal anti-discrimination laws address an "historic evil of national proportions." *Albemarle Paper Co. v. Moody*, 422 U.S. at 416.

Respondent seeks to distinguish these established interpretations of other laws by pointing to the section of the ADEA which provides that an employer may "discharge or otherwise discipline an individual for good cause". 29 U.S.C.

§623(f)(3). (R.Br. 43). But the NLRA contains an essentially identical provision:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. §160(c). In both statutes the preposition "for" means "because of"[8], and refers to the employer's reason for acting at the time of the discharge. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 n.6 (1983).

Respondent urges, finally, that the Court should ignore these established interpretations of other federal statutes because those statutes, unlike the ADEA, "do not focus on the employee's negligence or misconduct." (R.Br.45). But nothing in the language of the ADEA suggests that its purpose is to "focus on the employee's ... misconduct". On the contrary, as experience has already indicated, the central vice of respondent's proposed per se rule is *precisely* that it requires federal court's to "focus on the employee's ... misconduct", rather than to "focus ... [on] whether the employer is treating 'some people less favorably than others'" for unlawful reasons. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

III. RESPONDENT'S PROPOSED PER SE RULE IS INCONSISTENT WITH DECISIONS OF THIS COURT

A. Scope of Coverage of the ADEA

Respondent contends that the complaint in this action should be dismissed because the ADEA does not apply to a person who has committed serious misconduct. (R. Br. 27 n.42). "[A]n employee who knowingly engages in

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[8] See Webster's Seventh New Collegiate Dictionary, 325 (1967).

discharge-worthy misconduct is ... simply not protected ... under the statute". (R. Br.28). The plain language of the ADEA, however, contains no such exception for the "undeserving" (R. Br. 27 n.42), but applies broadly to "any individual." 29 U.S.C. § 623 (a)(1). Where Congress wished to exclude a group of persons from coverage by the inclusive statutory language, it did so expressly, excepting, for example, persons under forty, 29 U.S.C. § 631 (a), and certain elected and policy-making government officials. 29 U.S.C. § 630 (f).

This Court has repeatedly refused to exclude employees or job applicants from the protection of federal law because they may have engaged in misconduct. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), held that Title VII applied to the discrimination claims of a job applicant who had previously been arrested and convicted for deliberately obstructing the road to the plant at issue, despite the "seriousness and harmful potential" of the applicant's conduct. 411 U.S. at 806 n. 21; see also *id.* at 806 ("a seriously disruptive act"). In *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), this Court rejected an argument, indistinguishable from that of respondent, that Title VII did not apply to employees who had stolen property from their employer:

> Respondents contend that ... Title VII affords petitioners no protection in this case, because their dismissal was based upon the commission of a serious criminal offense against their employer. We think this argument is foreclosed by our decision in McDonnell Douglas Corp. v. Green .... We cannot accept respondents' argument that the principles of McDonnell Douglas are inapplicable where the discharge was based ... on participation in *serious misconduct* or crime directed against the employer. The Act prohibits *all* racial discrimination, without exception for any group of particular employees ....

427 U.S. at 282-83 (Emphasis added). In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Court rejected a similar argument that the NLRA should be construed not to protect undocumented alien workers who had violated federal criminal laws by entering the United States illegally.[9]

B. Prima Facie Case

Respondent suggests that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), makes proof of qualification a necessary element of any cause of action for discrimination, without which a plaintiff can never establish a prima facie case. (R. Br. 35-40). At this stage of the proceedings, however, the Sixth Circuit properly assumed that petitioner could establish a prima facie case. (Pet.App. 5a, 6a, 6a n.6)[10]. The question is whether after-acquired information constitutes a complete defense to a proven violation of the ADEA. See *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302 (6th Cir. 1992)(complaint dismissed despite district court finding of Title VII violation), *vacated*, 114 S.Ct. 22 (1993).

Proof of qualification is not a necessary element of a prima facie case. The touchstone of a disparate treatment claim, under Title VII or the ADEA, is not whether a plaintiff was qualified, but "whether the employer is treating

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[9] "The breadth of [the statutory language] is striking: The Act squarely applies to 'any employee'. The only limitations are specific exceptions.... Since undocumented aliens are not among the few groups expressly exempted by Congress, they plainly come within the statutory definition of employee." 467 U.S. at 891-92.

[10] Respondent acknowledges that in the proceedings below "for purposes of summary judgment, the Banner assumed petitioner was subject to discriminatory discharge." (R.Br.49 n. 69). See Brief on Behalf of Defendant - Appellee, *McKennon v. The Nashville Banner Publishing Co.*, No. 92-5917 (6th Cir.), 28 ("For the purpose of summary judgment, a discriminatory motive in discharging the plaintiff is assumed....")

'some people less favorably than others'" because of some criterion, such as age, forbidden by federal law. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). In order to establish a prima facie case, a plaintiff need only adduce evidence "from which one can infer, if [the employer's] actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act'". 438 U.S. at 567. In determining the actual motives of an employer, the qualification *vel non* of a plaintiff may well be relevant evidence, since it tends to undermine or support a possible non-discriminatory explanation for the employer's actions. But qualifications or disqualifications of which an employer was unaware are simply irrelevant to a determination of the employer's state of mind; in the instant case petitioner's actions in copying the disputed documents, even if in some sense relevant to her qualifications, were of course unknown to respondent when it dismissed her in October, 1990.

This Court has repeatedly stressed, moreover, that the formula in *McDonnell Douglas* was not "the only means of establishing a prima facie case .... Our decision in that case ... did not purport to create an inflexible formulation." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); see also *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. at 575-76. This Court has twice expressly held that a plaintiff can establish a prima facie case without evidence of individual qualifications. *Teamsters v. United States*, 431 U.S. at 358-60; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 772 (1976). Direct evidence of discrimination, such as a smoking gun memorandum directing personnel officials to "fire all black workers," would obviously suffice to establish a prima facie case, regardless of whether the *McDonnell Douglas* formula was satisfied. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

C. Standing

Respondent's standing argument can fairly be described as an "academic exercise in the conceivable." *United States v. SCRAP*, 412 U.S. 669, 688 (1973). Respondent does not deny that what actually occurred in this case is that petitioner was fired on October 31, 1990, for reasons that necessarily had nothing to do with the copied documents; respondent dismisses those events, however, as a mere "historical fact". (R.Br. 34). In applying this Court's standing decisions, respondent insists, actual events should be ignored: the "only real issue" is what circumstances should be "deemed to have occurred ... based on policy considerations." (*Id.*). Respondent urges this Court to pretend that petitioner was fired for misconduct in the fall of 1989, a year before her actual dismissal. In this make-believe scenario, the discriminatory policy alleged to have existed in the fall of 1990 would have had no impact on petitioner, since by then she would not have worked for respondent for a year. This hypothesized scenario, respondent urges, "trumps the actual event[s]". (*Id.*)

Petitioner's standing, however, should be determined in light of what actually occurred in the real city of Nashville, Tennessee, in October 1990, not on the basis of non-existent occurrences in an imaginary world hypothesized to exist "based on policy considerations." The linchpin of standing, this Court has repeatedly held, is "injury *in fact*". *Northeastern Florida Gen. Contractors v. Jacksonville*, 124 L.Ed. 2d 586, 595 (1993)(emphasis added); *Lujan v. Defenders of Wildlife*, 119 L.Ed. 2d 351, 364 (1992). Standing issues are controlled by the "actual ... not ... hypothetical" events. *Northeastern Florida Gen. Contractors*, 124 L.Ed. at 595; *Lujan*, 119 L.Ed.2d at 365. The existence of standing, where controverted, is determined, not on the basis of policy based speculation, but by "evidence adduced at trial." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.30 (1979). Standing can neither be created nor eliminated by hypothesizing circumstances which did not in fact occur.

Cf. Allen v. Wright, 468 U.S. 737, 751 (1984). "Having injured [petitioner] solely on the basis of an unlawful classification, [respondent] cannot now hypothesize that it might have employed lawful means of achieving that same result." *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 320 n.54 (1978).

D. The Clean Hands Doctrine

The clean hands doctrine cannot support the per se rule advocated by respondent. That doctrine, where applicable, limits only the availability of equitable relief; the ADEA, however, expressly authorizes the award of all appropriate "*legal* or equitable relief."[11] 29 U.S.C. §§ 626 (b), 626 (c)(1) (Emphasis added). Even as to equitable relief, the clean hands doctrine is not a mechanical rule, but turns on the particular circumstances of each case and involves the "free and just exercise of discretion" by the court. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 246 (1933). The discretion of a district judge to deny some relief in some cases cannot justify a per se rule mandating denial of all relief in every case.

After-acquired information which might have prompted an employer to dismiss an employee need not involve employee misconduct sufficiently egregious to warrant application of the clean hands doctrine. *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897) (misconduct must be "offensive to the dictates of natural justice."). The often

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[11] Although backpay has for other purposes been characterized by this Court as equitable, it is difficult to see how the discretionary maxims of equity could readily be applied in an ADEA case in which the jury awards backpay. The ADEA provides a statutory right to trial by jury without regard to the nature of the relief being sought. *Lorillard v. Pons*, 434 U.S. 575 (1978). *Lorillard* concludes that Congress intended monetary awards under the FLSA to be treated as legal remedies. 434 U.S. at 583 n.11. The ADEA incorporates the FLSA remedial scheme.

mundane workplace rules enforced by employers need not, and frequently do not, involve transgressions of such magnitude; an employer may dismiss a worker for simple inefficiency, or for actions that other employers might tolerate or even approve of. Similarly, the clean hands doctrine can bar relief only where the plaintiff's unconscionable actions have caused the defendant significant harm. J. Pomeroy, *A Treatise on Equity Jurisprudence*, v.ii, p. 99 (1941). Manifestly not every rule violation which might lead to the dismissal of an employee will necessarily involve such injury. The doctrine is also limited to cases in which the plaintiff's actions were part of the same transaction which gave rise to the claim for equitable relief, H.L. McClintock, *Handbook of Equity* 34 (1936), a requirement that clearly is not met where, as here, the employer complains of employee action that occurred a year before the alleged unlawful dismissal. *Calloway v. Partners National Health Plans*, 986 F.2d 446, 450-51 (11th Cir. 1993).

Like any other limitation on relief, moreover, the clean hands doctrine cannot be invoked in a manner "which, if applied generally, would ... frustrate the central statutory purposes of eradicating discrimination ... and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v Moody*, 422 U.S. 405, 421 (1975). Employee misconduct which might otherwise warrant application of the clean hands doctrine, for example, may not be invoked to limit relief against an employer which discriminates in the sanctions it imposes for such misconduct, see, e.g., *McDonald v.Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), or which investigates only, or more thoroughly, employees over forty, or former employees who file ADEA charges.

In its attempt to invoke the clean hands doctrine, respondent resorts to somewhat inflated rhetoric, accusing petitioner of "betrayal" (R.Br. 42), "theft" (R.Br. 1, 15) and

a "cover-up." (R.Br. 41)[12]. The instant case, however, does not involve Aldrich Ames, Michael Milken or the Watergate conspirators. Petitioner is an ordinary secretary, employed by a small circulation newspaper, who, anticipating that she might be unlawfully dismissed, copied several company documents that she thought showed that she was being mistreated. Respondent cannot plausibly invoke the clean hands doctrine with regard to employee actions precipitated by an impending violation of federal law.

IV. Any Injury Sustained by Respondent Should be Redressed Under State Law.

Respondent argues vociferously that it has been grievously wronged by petitioner's asserted conduct. Respondent's characterization of that conduct goes well beyond the actual record in this case. (See pt. V, infra). Be that as it may, if respondent wishes to assert any claim against petitioner, respondent, like any other employer in Tennessee, must base that claim on state law.[13]

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[12] This particular allegation is somewhat ironic, since the effect and purpose of the per se rule advanced by respondent are to preclude the federal courts, and EEOC, from investigating or determining whether there had been a violation of federal law. See M. Rubinstein, "The Use of Predischarge Misconduct Discovered After an Employee's Termination as a Defense in Employment Litigation," 24 Suffolk U. L. Rev. 1, 28 (1990) ("There is something wrong with a body of law which allows an employer to cover up its illegal activities by searching an employee's past for unknown fabrications.")

[13] *Mardell v. Harleysville Life Insurance Co.*, 1994 WL 396512, *12 (3d Cir. 1994) ("such evidence may serve as the foundation for a claim of fraud, conversion, or the like by the employer against the employee in the appropriate forum"); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 989, 991 (9th Cir. 1987)("If Sea-Land wanted to sue Omar for breach of contract, its action could not be under the Jones Act.")

Respondent asserts that petitioner "stole" a dozen sheets of paper on to which she had photocopied certain information. (R.Br. 1). Respondent may conceivably have an action for conversion under Tennessee law. Respondent also argues that all wages which petitioner received from the fall of 1989 until her October 31, 1990, dismissal, were obtained by "deception". (R.Br. 41). If Tennessee law gives to an employer in such a situation a right to sue for return of those wages, respondent may also be able to pursue such a state claim. In some instances these or other state causes of action might offset, substantially or completely, a plaintiff's federal claim. There may be circumstances in which a federal court would have supplemental jurisdiction to consider a counter-claim based on state law. 28 U.S.C. § 1367.

Respondent, however, does not seek to assert any state law claims. Rather, evidently regarding the provisions of Tennessee law as deficient, respondent urges this Court to craft a federal common law of employer rights and remedies. Respondent apparently acknowledges that Tennessee law gives it no right in these circumstances to obtain repayment of wages paid to petitioner. (R.Br. 35 n.51). Respondent does not claim it was injured by any disclosure of confidential information to the public or to its competitors, since no such disclosure occurred. Respondent understandably has little interest in recovering the fair market value of a few pages of photocopying. Similarly, the amicus Chamber of Commerce, evidently broadly dissatisfied with state laws throughout the nation, insists that a per se federal rule regarding "serious misconduct" is necessary to "maintain important workplace standards of conduct."[14] Deeming insufficient state law claims and regulations in this area, the Chamber of Commerce urges this Court to devise a defense to the ADEA which would provide to its 220,000

[14] Motion of the Chamber of Commerce of the United States for Leave to File Brief Amicus Curiae, par. 3, p. i.

members "a powerful incentive to combat employee fraud and misconduct".[15]

This Court, however, has no general mandate to fashion judicial rules to police the American workplace. From among the wide variety of issues that arise in the nation's offices, factories and farms, Congress has selected only a limited number for control by federal law, leaving the rest for regulation by the states, or to less formal resolution by employers, unions, and individual workers. The care and specificity with which Congress has selected only certain subjects for federal regulation compels considerable caution when the federal courts are urged to resolve issues which Congress has deliberately chosen not to address.

Fashioning standards of conduct for workers and job applicants would require the sort of legislative line drawing that courts are ill-equipped to engage in. Respondent urges that a per se federal rule should distinguish "serious" employee misconduct from moderate, minor, or technical infractions. The Chamber of Commerce insists the rule should extend to resumé "fraud", but apparently not to mere puffing, exaggeration, or minor mistakes in resumés or job applications. Any sensible standard of employee conduct would undoubtedly distinguish between levels of infractions, but it is difficult to see how a federal court would have the ability, or authority, to establish such a classification system.

Adoption by the federal courts of the proposed per se rule would have little effect on the actions of employees or job applicants. Such a rule would impose sanctions on

[15] *Id.*, par. 5. The ADEA, of course, was enacted, not to police employee misconduct, but to end invidious discrimination by employers. The paramount incentive under the ADEA is that "the reasonably certain prospect" of a monetary award constitutes an "incentive ... which causes employers ... to self-examine and to self-evaluate their employment practices." *Albemarle Paper Co. v. Moody*, 422 U.S. at 417-18.

only those errant workers or job applicants who had meritorious discrimination claims. Less than .005% of Americans workers file employment discrimination lawsuits in federal court in any given year[16]; not all of these are found to be meritorious. For 99.995% of American employees -- those who are not discrimination victims, and those victims who choose not to sue -- the per se rule would be largely irrelevant. It would be exceedingly peculiar to interpret the ADEA to impose on discrimination victims burdens which neither federal nor state law places on otherwise indistinguishable non-victims[17].

Even where the proposed per se rule would apply, the redress it would provide to aggrieved employers would be entirely arbitrary. Ordinarily the size of a monetary award is based primarily on the magnitude of the injury sustained by the victim. But under the per se rule, the "remedy" accorded to an employer would consist of cancellation of the employee's discrimination claim, the magnitude of which turns on the amount of injury that had been sustained by the employee. Thus an employer which had suffered a $10 injury might receive the windfall of cancellation of a $100,000 liability. Here, as in *St. Mary's Honor Center v. Hicks*, 125 L. Ed. 2d 407 (1993), federal anti-discrimination law cannot be converted into a vehicle for solving largely unrelated problems. "The elimination of ... discrimination ... is a large task and one that should not be retarded by efforts to achieve broader purposes lying

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[16] Brief Amicus Curiae of the Chamber of Commerce of the United States, p. 9 n. 8.

[17] If Tennessee were to enact such a strangely selective rule, giving employers a right to a refund of wages from errant workers who filed meritorious ADEA suits, but from no other employees, such a state statute would certainly be struck down as inconsistent with the ADEA. See *Burnett v. Grattan*, 468 U.S. 42, 53 n.15 (1984).

beyond the jurisdiction of [the federal courts]". *Swan v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 22 (1971).

V. WHETHER RESPONDENT WOULD HAVE DISMISSED PETITIONER FOR THE ASSERTED MISCONDUCT CANNOT BE RESOLVED BY SUMMARY JUDGMENT

Under both the standard now advanced by respondent and the standard advanced by petitioner, an employer cannot invoke after-acquired information without proving that it would have dismissed the plaintiff on the basis of that information. The district court below did not purport to resolve that question. Respondent now asks this Court to grant partial summary judgment regarding this issue. This Court, however, does not ordinarily undertake to consider fact-bound questions that have not been squarely addressed by the lower courts. This issue is one that should be determined by the district court on remand.

This issue cannot be resolved by summary judgment in this case. The inherently speculative nature of this question places on the party bearing the burden of proof, the employer, a substantial burden. The Chamber of Commerce of the United States urges, correctly in our view, that an employer seeking to prove that it would have dismissed an employee must adduce "evidence of uniform rules applied in an even-handed manner"[18]. As the Third Circuit has observed: "At one time or another probably every employee commits an infraction at work and hopes that the boss never finds out." *Mardell v Harleysville Life Insurance Co.*, 1994 WL 396512, *14 n. 28 (3d Cir. 1994). The Chamber of Commerce asserts that at least "30% of job

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[18] Brief Amicus Curiae of the Chamber of Commerce of the United States, p. 16; see also Motion for Leave to File Brief Amicus Curiae of the Chamber of Commerce of the United States, par. 5 (employer must demonstrate the existence of "objective rules and ... uniform administration").

applicants materially misrepresent their credentials."[19] Manifestly, however, no rational employer would dismiss every employee guilty of misconduct. As other business amici note, an employer which fired every worker guilty of some infraction "would soon find itself with no experienced workers, no productivity, no profits, and an abundance of self-inflicted lawsuits."[20] Thus the mere fact that a worker committed some infraction, on the job or during the application process, proves little; the critical burden on the employer is to establish by reference to both objective rules and actual practice which types of infractions, if any, necessarily led to dismissal. In the instant case respondent adduced neither type of evidence. Respondent's conclusive affidavits were contradicted or undermined in a number of respects. (P.Br. 5-6).

Respondent attempts to avoid these difficulties by repeatedly asserting that petitioner herself testified that her conduct, if known to respondent, "would have led to discharge"[21]. However, the testimony at issue, set out at pages 153a-155a of the Joint Appendix, reveals that petitioner actually insisted she would *not* have been terminated for taking the documents home, since she did not make them public[22].

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[19] Motion for Leave to File Brief Amicus Curiae of the Chamber of Commerce of the United States, par. 4.

[20] Brief Amici Curiae of the Equal Employment Advisory Council, et al., p. 21.

[21] R. Br. 14; see also *id*. at 1, 6, 7, 9, 11, 15, 18, 41, 48, 49.

[22] "Q -- [Didn't you know that if] Mr. Simpkins, had found out that you had copied these documents and taken them home without permission, these confidential documents, that he would have terminate[d] you?

"A. No, I don't know that.

* * *

Counsel for respondent seeks to offer in this Court additional arguments for dismissal. But see *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 9 (1981). Counsel objects that the documents at issue were shown to petitioner's husband and attorney[23]. But the company officials who signed respondent's affidavits and dismissal letter evidently did not believe those actions were grounds for dismissal, since they mentioned neither in the affidavits and letter. (J. App. 35a-43a). Counsel for respondent accuses petitioner of "fraud", "deceit" and a "coverup"[24], words redolent with implications of perjury and forgery. Nothing in the record supports any such charge. Respondent does not deny that the documents may contain evidence supporting petitioner's discrimination claim (see P. Br. 4); rather than dismissing the documents as irrelevant, respondent complains it has been "sandbagg[ed]" (R. Br. 22 n. 33) because it did not learn until after this suit was filed that petitioner had them. Respondent concedes company officials had previously sought to destroy several of the documents, and had actually directed petitioner to shred them. (R. Br. 7,15).

Respondent urges, finally, that petitioner should be denied relief if this Court finds that "any reasonable employer would have terminated an employee under the circumstances that the present case presents." (R.Br. 19). This argument fundamentally misconceives the role of federal courts in enforcing the ADEA. "The Federal Judge ... does not sit as a sort of high level industrial arbiter",

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"Q. And you understood if you took them home, you would have been terminated?

"A. No, I really didn't understand that because they were safe in the house." (J. App. 154a).

[23] R. Br. 6 n. 12, 7, 15.

[24] R. Br. 21 n. 34, 26, 27 n. 42, 41, 41 n. 57, 43.

Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968), authorized to dispense mercy to employees of "unreasonably" harsh employers, or to penalize employees of "unreasonably" lax employers. In a disparate treatment case the responsibility of the federal courts is limited to determining whether the employer engaged in intentional discrimination, and to providing to victims of discrimination the remedies authorized by federal law.[25]

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be reversed, and the case remanded for a trial on the merits.

Respectfully submitted,

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[25] See *Brennan v. Reynolds & Co.*, 367 F. Supp. 440, 444 (N.D. Ill. 1973) ("[The ADEA] is concerned about age discrimination. Its purpose is not to solve other problems about employment.... [The Act] does not cast upon the Court the duty of determining that a discharge was, for reasons other than age, a justifiable discharge. Its serves only to prevent discharge because of age alone").